IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Detention of DAVID TYLER FAIR, Petitioner.	)	No. 80498-2 En Banc Filed October 22, 2009

J.M. JOHNSON, J.—When David Tyler Fair was 22, he molested several young girls. The State filed charges against him, and he agreed to plead guilty to one count of child molestation in the second degree. He was sentenced to 20 months but received a special sex offender sentencing alternative (SSOSA) [1] suspending the jail sentence and allowing conditional release on community supervision. In following years, Fair committed other crimes for which he spent a total of 15 years in prison in two states. While incarcerated, Fair admitted to 17 other incidents involving sexual contact with

[1] *See former* RCW 9.94A.120(7) (1988). The SSOSA was recodified to RCW 9.94A.670 in 2000. Laws of 2000, ch. 28, §§ 5, 20.

kids. Before Fair was released, Washington successfully petitioned to civilly commit him as a sexually violent predator. Fair now argues that the State should not be able to commit him because the State had not proved that he committed a recent overt act of sexual violence. This court affirms the Court of Appeals and holds that the State was not required to plead or prove a recent overt act during Fair's commitment proceedings.

Facts and Procedural History

Fair was 22 years old when he went to a neighbor's house during a children's birthday party and gave alcohol to three young girls, whose ages were 12-13. He fondled and aggressively pursued and kissed the girls. The State filed charges of child molestation in the second degree. Fair agreed to plead guilty to one count. The court imposed a 20-month sentence for the admitted molestation charge but suspended the jail sentence in lieu of a SSOSA. Fair spent approximately six months on community supervision but failed to attend required sex offender treatment and did not properly report to the Department of Corrections (DOC). The State moved to revoke his SSOSA.

Before the motion to revoke his SSOSA was heard, Fair fled to New

Mexico, but only after robbing an acquaintance. In New Mexico, Fair committed several other nonsexual crimes and was convicted and incarcerated in that state.

While serving his New Mexico sentence, Fair pleaded guilty to the Washington robbery and judgment and sentence was entered in Washington.[2] The Washington court sentenced Fair to serve 87 months for his Washington crimes, to be served consecutive to his New Mexico sentence. The court also revoked Fair's SSOSA and reinstated the 20-month sentence for his child molestation conviction, to be served concurrent with the robbery sentence. Upon completion of his New Mexico sentence, Fair was transferred to DOC custody to serve the child molestation and robbery sentences in this state.

While Fair was incarcerated, he participated in a treatment program for sexual offenders. During this treatment, Fair admitted to his primary treatment provider that prior to his molestation conviction he had sexual contact with 17 child victims generally between 8 and 12 years old, but as young as 2 years. According to his treatment provider, Fair could not see how his sexual offending had negatively impacted anybody. Additionally,

[2] Fair was transferred pursuant to the agreement on detainers act, which allows Washington to take temporary custody of prisoners incarcerated in other states for the purpose of criminal trials. Ch. 9.100 RCW.

Fair said that he did not think there was anything wrong with having sex with children and frequently reported sexual arousal and masturbation to thoughts of minor girls.

Days prior to his scheduled release date, the State filed a petition to have Fair involuntarily committed pursuant to the sexually violent predators act (SVPA), chapter 71.09 RCW. Because Fair had not been released into the community between his incarceration for the sexually violent offense and the robbery, the State did not allege at trial that Fair had committed a recent overt act of sexual violence. Fair's treatment provider testified to his admissions in treatment. The State's expert, Dr. Dennis Doren, testified that during his interview with Fair, he had admitted to committing 16 sexual offenses against children and enjoying sexual fantasies about children. Dr. Doren diagnosed Fair with pedophilia, paraphilia/urophilia[3] and an antisocial personality disorder. Dr. Doren testified that with convicted sex offenders, sexual interest in children highly correlated with sexual reoffending. Dr. Doren concluded that Fair's pedophilia combined with his antisocial personality disorder made Fair likely to engage in predatory acts of

[3] Dr. Doren defined "urophilia" as sexual fantasies involving urine.

sexual violence if not confined to a secure facility.

At the conclusion of Fair's bench trial,[4] the court found beyond a reasonable doubt that Fair was a sexually violent predator and ordered that he be involuntarily committed for treatment. Fair appealed, and the Court of Appeals affirmed the trial court. *Fair v. State*, 139 Wn. App. 532, 161 P.3d 466 (2007). Fair petitioned this court for review, which was granted. *In re Det. of Fair*, 163 Wn.2d 1017, 180 P.3d 1291 (2008).

Issue

Whether the State must plead and prove a recent overt act where the offender has been confined continuously since being incarcerated for a predicate sexual conviction.

Standard of Review

The applicability of the constitutional due process guaranty is a question of law subject to de novo review. *Wash. Indep. Tel. Ass'n v. Wash. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24, 65 P.3d 319 (2003).

Analysis

I. Background

[4] Fair waived his right to a jury trial.

A. The Sexually Violent Predators Act

The SVPA, chapter 71.09 RCW, authorizes the State to petition for the involuntary commitment of sexually violent predators, defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility." Former RCW 71.09.020(16) (2006); former RCW 71.09.030 (2008). A sexually violent offense is defined to include child molestation in the second degree. Former RCW 71.09.020(15). To obtain an order of commitment, the State must prove beyond a reasonable doubt that the person is a sexually violent predator (SVP). RCW 71.09.060(1). If, on the date that the petition is filed, the person is living in the community (i.e., not incarcerated), the State has the additional burden of proving beyond a reasonable doubt that the person had committed a recent overt act.[5] *Id.*

We have recently noted that the SVPA was enacted in Title 71 RCW, "Mental Illness," to compensate for perceived deficiencies in Washington's

[5] The statute defines "'[r]ecent overt'" act as "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." Former RCW 71.09.020(10).

mental illness commitment law. The legislature expressly recognized that the prior version of chapter 71.05 RCW was "'inadequate to address the risk to reoffend because during confinement [sexual] offenders do not have access to potential victims and therefore they will not engage in an overt act during confinement . . . .'" *In re Det. of Lewis*, 163 Wn.2d 188, 193, 177 P.3d 708 (2008) (quoting RCW 71.09.010).

Although the SVPA excuses the State from proving a recent overt act when a petition is filed against an incarcerated individual, the commitment must still satisfy constitutional due process. *In re Det. of Henrickson*, 140 Wn.2d 686, 694, 2 P.3d 473 (2000).

B. Due Process

We have had several occasions to define the requirements of due process in the recent overt act context. *See*, *e.g.*, *id.* A state has a legitimate interest in treating the mentally ill and protecting society from their actions. *In re Det. of Albrecht*, 147 Wn.2d 1, 7, 51 P.3d 73 (2002) (citing *Addington v. Texas*, 441 U.S. 418, 426, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)). Constitutional principles must be followed, including the requirement that no person may be deprived of "life, liberty, or property, without due process of

law." U.S. Const. amends. V, XIV; Wash. Const. art. I, § 3.[6] Involuntary civil commitment is a substantial curtailment of individual liberty so due process is required. *Lewis*, 163 Wn.2d at 193.

A person must be both mentally ill and dangerous to be civilly committed consistent with due process. *In re Pers. Restraint of Young*, 122 Wn.2d 1, 27, 857 P.2d 989 (1993). In the historical civil commitment context, we have held "a showing of a substantial risk of physical harm as evidenced by a recent overt act" is necessary to comport with substantive due process. *In re Harris*, 98 Wn.2d 276, 284, 654 P.2d 109 (1982); *Henrickson*, 140 Wn.2d at 701-02. In the context of SVP commitments, we have held that because SVPs are often incarcerated prior to commitment, a recent overt act requirement under such circumstances "'would be impossible to meet.'" *Henrickson*, 140 Wn.2d at 700-701 (quoting *Young*, 122 Wn.2d at 41).

Due process does not require that """the absurd be done before a compelling state interest can be vindicated."""" *Id.* at 695 (quoting *Young*, 122 Wn.2d at 41 (quoting *People v. Martin*, 107 Cal. App. 3d 714, 165 Cal.

[6] Fair does not argue that Washington's constitution provides greater protections than the federal constitution; our analysis under both constitutions is the same. *See City of Spokane v. Douglass*, 115 Wn.2d 171, 176-77, 795 P.2d 693 (1990).

Rptr. 773 (1980))). Requiring proof of a recent overt act for an incarcerated sex offender is absurd because incarcerated sex offenders do not have access to potential victims. *Id.* (quoting *Young*, 122 Wn.2d at 41); *see also Lewis*, 163 Wn.2d at 193 (quoting RCW 71.09.010); *id.* at 201-02 (affirming the Court of Appeals' reasoning in this case).[7] Thus, in the case of a person incarcerated for a sexually violent offense, or for an act that would itself qualify as a recent overt act, due process does not require the State to prove a recent overt act occurred between arrest for such an offense or act and release from incarceration. *See Henrickson*, 140 Wn.2d at 695.

II. Due Process Does Not Require the State To Prove a Recent Overt Act When the Offender Was Temporarily Released in the Community Prior to a Lengthy Incarceration

Fair first argues that, because he was released into the community between his child molestation conviction and the filing of the SVP petition, the State is required to prove a recent overt act during that time period. For

[7] Requiring proof of a recent overt act by an incarcerated sex offender could also lead to other absurd results. As we have previously noted, such a rule could mean that any post-arrest supervised release for whatever reason would provide the opportunity to circumvent the distinctions of the SVPA. *Henrickson*, 140 Wn.2d at 696. Such a rule would undermine the legislature's purpose for SSOSAs: "to prevent future crimes and protect society." *State v. Young*, 125 Wn.2d 688, 693, 888 P.2d 142 (1995). It would provide a disincentive for courts to grant SSOSAs and would set up a conflict between the legislature's interests in treating first time sex offenders and protecting society from more dangerous predators.

this proposition Fair relies on *Albrecht*, 147 Wn.2d 1.

In *Albrecht*, the respondent served a 48-month sentence for second degree child molestation. *Id.* Albrecht completed serving his sentence and was released to community placement. *Id*. Thirty days later, Albrecht was arrested for violating the conditions of his community placement. *Id.* at 5. Albrecht entered into plea negotiations with the State and accepted a 120-day sentence in jail. *Id*. While Albrecht was serving the sentence for violating the conditions of his community placement, the State filed a petition to commit him as an SVP. *Id*. at 4-5. The State did not allege or prove a recent overt act occurred during Albrecht's release following his 48 month sentence. We held that due process required the State to prove a recent overt act because it was no longer an impossible burden once Albrecht had been released into the community. *Id.* at 10.

Fair essentially asks us to extend *Albrecht* to require proof of a recent overt act where there has been community release prior to a lengthy incarceration. We decline to do so. Our holding in *Albrecht* applied only to a *recent* release from confinement—not a prior release into the community before a lengthy incarceration:

[O]nce the offender is released into the community, as Albrecht

> was, due process requires a showing of *current* dangerousness.
>
> . . . An individual who has *recently* been free in the community and is subsequently incarcerated for an act that would not in itself qualify as an overt act cannot necessarily be said to be *currently* dangerous.

Id. at 10-11 (emphasis added). In contrast, Fair had been in continuous confinement for 12 years prior to the State's filing. Evidence of his acts while he was in the community under his SSOSA over 12 years ago would not be recent or current evidence of his present dangerousness. His latest incarceration, however, was also to serve his sentence for child molestation.

This case is controlled instead by *Henrickson*, 140 Wn.2d 686.[8] Henrickson was convicted of attempted kidnapping in the first degree and communication with a minor for immoral purposes. *Id.* at 689. Henrickson remained free on bond for three years, during the pendency of his appeal. *Id*. Henrickson eventually served a 50-month sentence. *Id*. The day before Henrickson's scheduled release from the sexual molestation charges, the State filed an SVP petition. *Id.* at 690.

In *Henrickson*'s companion case, Halgren was convicted of unlawful

[8] Fair argues that *Henrickson* does not apply to him because he was not incarcerated for a sexually violent offense at the time the SVP petition was filed. We reject that argument below in section III.

imprisonment involving a prostitute and was released into the community for three months pending sentencing. *Id.* at 691. Halgren received an exceptional sentence, was incarcerated, and appealed. *Id*. Halgren served approximately 35 months before his sentence was overturned on appeal.[9] The State filed an SVP petition against him before his release from confinement (again, for sexual violation).

Both Henrickson and Halgren claimed their postarrest community release required the State to prove a recent overt act. We held that when, "on the day a sexually violent predator petition is filed, an individual is incarcerated for a sexually violent offense, RCW 71.09.020(6), or for an act that would itself qualify as a recent overt act, RCW 71.09.020(5), due process does not require the State to prove a further overt act occurred between arrest and release from incarceration." *Id.* at 695.

Fair's situation is not distinguishable from *Henrickson*'s for purposes of due process analysis. Just like Henrickson and Halgren, Fair was released on community supervision prior to being incarcerated for a crime that would qualify under the sexually violent predator statute as a sexually violent

[9] *See State v. Halgren*, 87 Wn. App. 525, 530, 942 P.2d 1027 (1997) (noting sentencing hearing held on March 21, 1996), *rev'd*, 137 Wn.2d 340, 971 P.2d 512 (1999) (overturning Halgren's exceptional sentence).

offense or as a recent overt act. *Id.* at 697-98. Fair served a lengthy sentence of continuous confinement and was jailed again for crimes that included sexual violation of child molestation and remained incarcerated when the State filed an SVP petition.

Accordingly, we reject Fair's argument and hold that under *Henrickson* due process did not require the State to prove a recent overt act during Fair's community release prior to confinement.

III. Due Process Does Not Require Proof of a Recent Overt Act When the Respondent Has Been Continuously Incarcerated Even If He Has Completed His Sentence for the Sexually Violent Offense

In a related argument, Fair contends that, because he finished serving his shorter sentence for child molestation before finishing his longer concurrent sentence for robbery, he was not technically "incarcerated for a sexually violent offense" at the time the State filed its petition. *Id.* at 689.[1] Hence, under Fair's reasoning, the *Henrickson* exception for incarcerated sex offenders does not apply to him and the general due process rule of *Harris*, 98 Wn.2d at 284, requires the State to prove a recent overt act.

[1] "We hold no proof of a recent overt act is constitutionally or statutorily required when, on the day the petition is filed, an individual is incarcerated for a sexually violent offense, or an act that by itself would have qualified as a recent overt act." *Henrickson*, 140 Wn.2d at 689 (citation omitted).

This argument is without merit. Due process does not require that the absurd be done before the compelling state interests can be vindicated. *Henrickson*, 140 Wn.2d at 695. Fair's situation is indistinguishable from Henrickson's for purposes of due process analysis. Requiring proof of a recent overt act by an incarcerated person is just as absurd in Fair's case as it was in Henrickson's. Both were continuously confined after being incarcerated for a sexually violent offense or an act that by itself would have qualified as a recent overt act. The fact that Fair continued to be incarcerated after serving his (shorter) child molestation sentence does not require the State to prove that a recent overt act occurred during his incarceration.[11] Accordingly, we expressly apply the holding in *Henrickson* to include all persons who have been continuously confined since being incarcerated for a sexually violent offense, or an act that qualifies as a recent overt act under the statute.

Conclusion

Fair asks us to hold that due process principles required the State to

[11] Beyond the due process analysis, the rule Fair seeks is undesirable from a policy perspective as well. The State would not be able to successfully petition for commitment of any prisoner in Fair's position because SVPs like Fair who target young girls do not have access to victims while incarcerated.

prove a recent overt act in his SVP commitment trial even though he had been continuously incarcerated for child molestation and other nonsexual crimes. Fair's arguments are contrary to the statute and our due process jurisprudence. Accordingly, we reject those arguments and uphold his commitment as an SVP. We affirm the Court of Appeals and the trial court's commitment order.

AUTHOR:
Justice James M. Johnson

WE CONCUR:
Justice Susan Owens

Justice Barbara A. Madsen